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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 631

BUILDERS CORPORATION OF AMERICA, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the district court for judgment in favor of the United States is not reported. The opinion of the Court of Appeals for the Ninth Circuit (Pet. 1a-8a) is reported at 320 F. 2d 425.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1963. On November 5, 1963, by order

of the Chief Justice, the time for the filing of a petition for a writ of certiorari was extended to November 20, 1963. The petition was filed on November 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the allegedly negligent actions of the Commanding Officer of the Sierra Ordnance Depot in connection with efforts to obtain maximum occupancy of petitioners' housing projects are within the "discretionary function" exception of the Federal Tort Claims Act (28 U.S.C. 2680(a)).

2. Whether the communications from the Commanding General, Sixth Army Headquarters, to the Commanding Officer, Sierra Ordnance Depot, upon which petitioners rely, imposed a duty owing to petitioners.

STATUTE INVOLVED

Section 2680 of Title 28, United States Code, provides in pertinent part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * *

STATEMENT

Petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover damages for allegedly wilful and negligent conduct of the Commanding Officer of the Sierra Ordnance Depot in failing to carry out purported directives of his superior officer concerning a program to assure maximum occupancy of dwelling units constructed by petitioners adjacent to the depot.

In 1951 the Ordnance Depot, located in an isolated area in northeastern California, was suffering from a shortage of housing for its civilian and military personnel. Upon a request by the Commanding Officer of the Depot, federal officials engaged in negotiations concerning the construction of additional dwelling units pursuant to the authority of the National Housing Act of 1934, 12 U.S.C. 1702, and of the Act of August 8, 1949, 12 U.S.C. 1748, *et seq.*, which required that private enterprise undertake the construction, rental and operation (Pet. 3 and 3a, n. 2).

Initially, the Department of Defense certified to the Federal Housing Authority (FHA) the necessity for 125 units. Thereafter the construction of an additional 150 units was authorized. On each of the projects FHA agreed to insure the mortgage (Pet. 3a-4a, n. 2).

Petitioner Herlong Sierra Homes, Inc., constructed the original 125 units which were completed and ready for occupancy in January 1954. It cost Herlong $9,000 monthly to meet the mortgage and other charges on these units (Pet. 4a, n. 2). Petitioner

Builders Corporation of America constructed the additional 150 units which were completed in late 1954. Builders' monthly mortgage and other costs were approximately $8,000. (Pet. 4a-5a, n. 2). From a preliminary study it was determined that 91 percent occupancy would be required in order for the petitioners to meet their costs of operation. However when the first units were ready for occupancy in January 1954, few of the personnel at the depot moved in (Pet. 5a, n. 2).

Between January 13, 1954, and July 10, 1954, the Commanding General of the Sixth Army sent three communications to the Commanding Officer of the Depot with respect to occupancy of the units (Pet. 4a-5a). The first quoted the policy of the Department of the Army, as set forth in paragraph 11b of AR 210-220, stating (Pet. 8a-9a):

> * * * the army, in initially certifying to the FHA the need for this housing, has assumed a definite moral obligation and has keen self-interest in all housing projects to assure that all units are occupied within the allowed occupancy factor for the individual project. Accordingly, it will be the direct responsibility of the installation commander to provide the mortgagor with a coordinated and aggressive program to assure maximum occupancy.

The second communication stated that to accelerate full occupancy of the projects and to present maximum opportunity to those not able to afford the rents in the housing projects, it was desired that an income limitation be established as to persons permitted to

occupy government quarters; that if such action did not bring about the desired results, steps should be taken to demolish certain of the temporary housing units, but not until after beneficial occupancy of the second 150 units had been obtained (Pet. 10a-11a).

In the third communication, the Commanding General requested that the following actions be taken to promote increased occupancy of the units: The establishment of an income limitation as to those civilian employees who would be permitted to occupy government quarters; the service of notice on other civilian personnel for vacation of their government quarters by a specified date; the selection of twenty-five sets of substandard family quarters for disposal; and the service of notice on the occupants of such quarters that, subject to the approval of the Department of the Army, they would be required to move on 30-days' notice (Pet. 15a).

In this action under the Tort Claims Act, petitioners sought to recover for financial losses allegedly suffered because of the lack of sufficient occupancy of the new units (Pet. 5). Petitioners based their claim upon the three communications (which they termed "orders") between the Commanding General and the Commanding Officer of the Depot. Petitioners' theory was that "by the communications, the Government voluntarily assumed a duty, and that reasonable care was required in its discharge" (Pet. 5a, n. 2).

In affirming the judgment of the district court in favor of the government, the court of appeals stated (Pet. 5a-6a)—

> The trial judge ruled the first two letters contained no direct or specific orders and were merely statements of existing and future policy. We agree. The third letter the trial judge ruled was an order which directed certain things to be done, but which did not go so far as to order eviction of anyone from their then present housing. * * * The trial judge ruled all the suggestions and orders had been followed and complied with by the officers so directed to act—that there was no "failure, either wilful or negligent, of government agents [specifically Colonel Leavitt and his staff] to carry out orders"—that all such orders so given were complied with:[1]

The court of appeals, however, did not find it necessary to decide whether any orders given had been complied with. It held that the activities of the Commanding General of the Sixth Army and the Commanding Officer of the Depot in implementing the policy of the Army to assist the mortgagors in obtaining maximum occupancy of the projects were within the "discretionary function" exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a) (Pet. 6a-8a).

ARGUMENT

1. Petitioners argue (Pet. 8) that the court of appeals erred in holding that the discretionary function exception "protects the government at all levels of activity." The short answer to the contention is that

[1] Colonel Leavitt was the Commanding Officer of the Depot.

no attempt was made to give the exception such a broad reach. On the contrary, below the level of the Commanding General of the Sixth Army, about whom petitioners do not complain, the court considered only the actions of the Commanding Officer of the Depot who, it found, was required to exercise discretion in implementing the Army policy to assist mortgagors in obtaining maximum occupancy of the projects. Specifically, the court held that the Commanding General "in whatever he requested or ordered, was exercising his discretion in attempting to encourage a policy of full and maximum use of the housing facilities available" (Pet. 7a); that such requests or orders "all required Colonel Leavitt [the Commanding Officer of the Depot], in the chain of command he was then holding, to exercise some discretion" (Pet. 6a); and that the "discretionary function" exception precluded suit based on such activities.[2]

Thus, the decision stands for no more than that, on the facts of this case, the exception applies to government officers at the level of the Commanding Officer of the Depot. Looking to specific language in *Dalehite* v. *United States*, 346 U.S. 15, as quoted by the court below (Pet. 7a),[3] it seems plain that the decision is entirely correct.

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[2] The court was satisfied that the Commanding Officer of the Depot had exercised his best judgment in what he did and how he did it (Pet. 7a). The district court in turn had held that all of the suggestions and orders had been followed and complied with, so that there was no failure either wilful or negligent to carry out orders (Pet. 6a).

[3] "It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do,

In urging that the court below erroneously applied the "discretionary function" exception to immunize the government from liability for actions of the Commanding Officer of the depot, petitioners rely upon *Indian Towing Company* v. *United States*, 350 U.S. 61 (Pet. 7-8). It is clear, however, that *Indian Towing* is inapplicable. There, the government conceded that the "discretionary function" exception in Section 2680(a) was not applicable to the negligent acts at issue. Accordingly, the Court's decision did not directly involve this exception or the circumstances in which it properly applies. See 350 U.S. at 64. Instead, *Indian Towing Company* was concerned with the so-called governmental function doctrine, *i.e.*, whether the Federal Tort Claims Act is applicable when the United States is engaging in "uniquely governmental" activity unrelated to any type of activity which might give rise to tort suits between private persons. The Court held that there was no broad "governmental function" exception to the Federal Tort Claims Act,

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that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion." 346 U.S. at 35-36.

and rejected any language in *Dalehite* which might be construed as indicating the contrary. On the other hand, the doctrine of *Dalehite* remained intact insofar as it relates to the "discretionary function" exclusion of Section 2680(a).[4]

2. In any event, these communications established no governmental duty running to petitioners upon which they could predicate an action under the Federal Torts Claims Act. One of the basic elements of actionable negligence is, of course, the existence of a legal duty running to the claimant. "The plaintiff must bring himself within the scope of a definite obligation, so that it might be regarded as personal to him." Prosser on *Torts*, § 31, p. 179.

Nowhere does it appear that the government assumed a definite obligation to petitioners to assure occupancy necessary to enable petitioners to carry the financial costs of the projects. On the contrary, it has been held that the certificate of need issued by the Army to the FHA made no representation, guaranty, or warranty of permanency or occupancy; that it was issued for the benefit of FHA and not for the benefit of the builder or operator; and that, conse-

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[4] In *Mahler* v. *United States*, 306 F. 2d 713, 723 (C.A. 3), certiorari denied, 371 U.S. 923, the court, quoting from the *Dalehite* opinion, pointed out: "Where there is room for policy judgment and decision there is discretion." The Third Circuit then continued: "Although there are portions of the *Dalehite* opinion which are no longer authoritative, we do not read * * * *Indian Towing Company* v. *United States* * * * as having retracted the language quoted." See also *United States* v. *Gregory*, 300 F. 2d 11, 13 (C.A. 10); *United States* v. *Hunsucker*, 314 F. 2d 98, 103-104 (C.A. 9).

quently, it could not be a basis of liability of the government to the operator of such a project who defaulted on his mortgage payments because the project was not occupied by the number of tenants originally determined to be necessary to insure profitable operation. *Henry Barracks Housing Corp.* v. *United States*, 281 F. 2d 196 (Ct. Cls.); see also *Deseret Apartments* v. *United States*, 250 F. 2d 457 (C.A. 10).

At best petitioners can point to no more than a policy to assist the mortgagor to obtain maximum occupancy, which policy rested only upon what the Army considered to be its "moral obligation" in certifying the need for housing to the FHA, and upon its own "self-interest" in the new housing projects. No basis exists for finding a legally enforceable duty to the private parties who constructed such units at their own financial risk. Whatever duty the Commanding Officer of the Depot had in initiating and carrying out a program for occupancy was owed solely to his superiors and not to petitioners. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-129. Absent the alleged legal duty, petitioners cannot recover under the Federal Tort Claims Act even if the government actions were not covered by the "discretionary function" exception. *Wooldridge Manufacturing Co.* v. *United States*, 235 F. 2d 513 (C.A.D.C.),

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
KATHRYN H. BALDWIN,
Attorneys.

January 1964

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